American Tissue Corporation *and* Service Employees International Union, Local 339, AFL–CIO. Case 29–CA–20226

September 28, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND TRUESDALE

On July 17, 2000, Administrative Law Judge Jesse Kleiman issued the attached supplemental decision.[1] The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the supplemental decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order as modified below.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, American Tissue Corporation, Brooklyn, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Substitute the following for paragraph 2(e).

"(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order."

Dated, Washington, D.C. September 28, 2001

Peter J. Hurtgen, Chairman

Wilma B. Liebman, Member

John C. Truesdale, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[1] The procedural history in this case is set forth in the judge's supplemental decision.

[2] In its exceptions, the Respondent contends, inter alia, that Victor Fuentes was not alleged as a discriminatee in the complaint and that there is no evidence in the record to support the judge's finding that he was discharged for striking along with the alleged discriminatees. We find no merit to this exception. Although the complaint specifically named 21 discriminatees who allegedly engaged in a strike and were discharged on July 30, 1996, it also alleged that "approximately five other employees whose names are presently unknown" were included in the same group. Further, as with the other alleged discriminatees, the General Counsel submitted into the record a copy of Fuentes' timecard indicating that he punched out during the same time that the other 25 discriminatees' timecards were punched out. Based on this evidence and credited testimony, the judge found that Fuentes was among the employees who joined in leaving the plant to go to the Labor Department. The judge therefore also found that he was among those discharged, based on credited testimony that the employees were told they would be fired if they left, and when the employees attempted to return to their jobs that day and the following day, they were denied entrance to the facility.

Contrary to his colleagues, Chairman Hurtgen would not find that the Respondent terminated Victor Fuentes in violation of Sec. 8(a)(3). In this regard he notes that Fuentes was not listed as a discriminatee in the complaint. Further, the record evidence shows only that his timecard indicates that he left the facility. Even assuming arguendo that his departure was linked to the concerted activity of the others, there is no showing that he was discharged or, if he was, that the discharge was because of concerted activity.

In addition, Chairman Hurtgen finds a procedural impediment to finding a violation as to Fuentes. The majority notes that the complaint named 21 discriminatees and alleged that approximately 5 others "whose names are presently unknown" were also discriminatees. The majority then sets forth the record evidence as to Fuentes. On the introduction of that record evidence, one would think that the General Counsel would have amended the complaint to name Fuentes as a discriminatee, inasmuch as Fuentes was then "known" to the General Counsel. The General Counsel never did so. Notwithstanding this failure, Respondent was apparently supposed to guess that Fuentes was an alleged discriminatee, and to mount any defense it may have had in this regard. Chairman Hurtgen would not leave this to guesswork. He would require the General Counsel to formally move to amend the complaint.

[3] The remedy has been modified to provide the appropriate make-whole relief for the Respondent's unlawful transfer of employee Elson Flores. Where the discrimination against an employee does not involve a discharge, the relief to be provided shall be in accordance with the Board's decision in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 52 (6th Cir. 1971).

We will modify the judge's recommended Order in accordance with our recent decision in *Ferguson Electric Co.*, 335 NLRB No. 15 (2001).

The Respondent contends that employees Holman Flores, Julio Ceasar Rivas, and Marcos Rivas have already been reinstated. Because the record is not sufficiently clear on this point, we will defer this issue to the compliance stage of this proceeding.

Emily De Sa, Esq. for the General Counsel.
George S. Issacson, Esq. and *Daniel C. Stockford, Esq. (Brann & Issacson),* for the Respondent.

DECISION

STATEMENT OF THE CASE

JESSE KLEIMAN, Administrative Law Judge. On the basis of a charge and amended charge filed on August 13 and November 22, 1996, respectively, by Service Employees International Union, Local 339, AFL–CIO (the Charging Party or Local 339), against American Tissue Corporation (the Respondent), Local 339 alleged that the Respondent has been interfering with, restraining, and coercing its employees in the exercise of rights guaranteed in Section 7 of the National Labor Relations Act (the Act), in violation of Section 8(a)(1) of the Act, and has been discriminating in regard to the hire and tenure and terms and conditions of employment of its employees, thereby discouraging membership in a labor organization in violation of Section 8(a)(1) and (3) of the Act. By answer timely filed, the Respondent denied the material allegations in the complaint, and raises as "Affirmative Defenses" that the "Complaint fails to state a claim upon which relief can be granted."

A hearing was held before me in Brooklyn, New York, from March 31 to September 29, 1997. Subsequent to the close of the hearing the General Counsel and the Respondent filed briefs.

On the entire record and the briefs of the parties and on my observation of the witnesses, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent, a New York corporation, with its principal office and place of business located at 135 Engineers Road, Hauppauge, New York (Engineers Road facility), where it is engaged in manufacturing pulp and paper products. The Employer also has additional facilities located at 110 Plant Avenue, Hauppauge, New York (the Plant Avenue facility), 45 Gilpin Avenue, Hauppauge, New York (the Gilpin Avenue facility), 85 Nicon Court, Hauppauge, New York (the Nicon Court facility), and 468 Mill Road, Coram, New York (the Coram facility). During the past year, the Respondent in the course and conduct of its business operations, sold and shipped products, goods, and materials valued in excess of $50,000 directly to firms located outside the State of New York. The complaint alleges, the Respondent admits, and I find that the Respondent is now, and has been at all material times, an employer engaged in commerce within the meaning of Section 8(a)(2), (6), and (7) of the Act. Shahram Roozrokh is vice president and Ghulam Farooq, foreman/supervisor of the Respondent. I also find based on evidence in the record that Roozrokh and Farooq are supervisors of the Respondent within the meaning of Section 2(11) of the Act and agents thereof, acting on its behalf within the meaning of Section 2(13) of the Act.

II. THE LABOR ORGANIZATIONS INVOLVED

The complaint alleges and I find that Local 339 is now and has been at all material times, a labor organization within the meaning of Section 2(5) of the Act. I also find that Local 707, International Brotherhood of Teamsters, AFL–CIO (Local 707) is now, and has been at all material times, a labor organization within the meaning of Section 2(5) of the Act. Service Employees International Union, Local 339, did not appear or otherwise participate in the hearing. No explanation for this was forthcoming.

III. THE ALLEGED UNFAIR LABOR PRACTICES

The complaint alleges that the Respondent threatened employees with discharge if they joined, supported, or assisted Local 707, or engaged in other protected and concerted activities; denied its employees the opportunity to work overtime and reassigned an employee to working on skids; issued written warnings to its employees; discharged its employees and denied them reinstatement because they had engaged in a work stoppage and also a strike and in other protected and concerted activities, and in order to discourage employees from engaging in such activities or other concerted a ctivities for the purpose of collective bargaining or other mutual aid or protection. The complaint also alleges that by these acts the Respondent has been interfering with, restraining, and coercing its employees in the exercise of rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act, and has been discriminating in regard to the hire and tenure and terms and conditions of employment of its employees, thereby discouraging membership in a labor organization and its employees from engaging in other protected and concerted activities for the purpose of collective bargaining or other mutual aid or protection in violation of Section 8(a)(1) and (3) of the Act.

A. The Evidence

According to the testimony of the General Counsel's witnesses, in early 1996, the Respondents' employees at its Plant Avenue facility contacted Local 707 because they considered that there were "a lot of injustices" and "abuses" occurring at work. After discussing these problems among themselves, employee Samuel Chavez[1] arranged meetings between the employees and Local 707's representative at his home. Sometime in June 1996[2] Local 707 commenced an organizing campaign and during the first half of July, Chavez distributed about 30 authorization cards to employees at the Plant Avenue facility for signatures during breaks, in the lunchroom, the restroom, or in the parking lot, and received signed authorization cards back from these employees. Employees Elson Flores and Jose Alberto assisted Chavez in the organizing process, also distributing cards.

On Friday, July 12 when the employees received their paychecks, they discovered that they had been underpaid for work-

[1] Chavez testified that in about April 1996 his supervisor, Shahram Roozrokh, had asked him to be a supervisor and if he accepted the position he would have to be on the side of the Employer not the employees.

[2] All the events herein occurred on dates in 1996, unless otherwise specified.

ing during the week including the Fourth of July holiday.[3] Therefore, about 15 employees decided not to work overtime on that day and punched out at about 3:30 p.m., instead of 7 p.m. nor did they return to work on Saturday, July 13. Chavez, Flores, and Alberto were among the employees who participated in this work action.[4] On Monday, July 15, the employees who had refused to work overtime on July 12, returned to work.[5]

The General Counsel's witnesses testified herein as to alleged threats made to them by the Respondent's vice president, Shahram Roozrokh, and Foreman Ghulam Farooq because of the walkout. Employee Joel Guzman testified that Roozrokh had approached him and had asked him, "[W]ho had decided to leave on that day at 3:30," and when Guzman responded, "I did this on my will," Roozrokh told him that "we were Communists and that he was going to fire all of us." Guzman also related that around mid-July, Farooq told him that "Samuel Chavez was a cancer to the company and he was going to be fired."[6] Julio Rivas also testified that Roozrokh had called him into his office on July 15, and told him that "he was going to fire all Hispanics" because of the actions they had taken the previous Friday, and that "he didn't want any more shit."[7] Chavez testified that Roozrokh had also called him into his office on July 15 and after asking him, "[W]hy we [employees] left early on Friday" and accused Chavez of threatening "to kill" those employees who would not leave work at 3:30 p.m. that day and those who intended to work on Saturday, and Chavez denied having done so.

Chavez testified that prior to July 12, he usually worked from 7 a.m. to 7 p.m. and that after the walkout on July 12 he only worked until 3:30 p.m. when his overtime ceased with management bringing in "two night operators . . . to start at 3:30." Alberto also testified that he noticed about three new employees who were learning the operation of the machines that he and other employees worked on, and Flores' affidavit states that for the first time, Farooq asked him to train a Polish worker on his machine. Neither Chavez nor Alberto worked overtime after July 12.[8] Also, in his affidavit, Flores related that the week of July 15 Roozrokh "brought in about 10 new workers, who were Polish and Indian."

Elson Flores had been an operator on a "Perini 2" machine and on July 15, Flores was given his first written warning concerning the cleanliness of his machine. Farooq told Flores that he never kept his machine clean and did not throw out the garbage and that he was going to give him a warning notice. According to Flores' affidavit he tried to explain that his machine was very complicated but when he had time he cleaned it. However, Farooq told him that "it had already been decided that I'd get the warning [and] that the next time that I got a warning, I'd be fired."[9] Flores had had no disciplinary problems until July 15, and in fact, Flores' personnel file shows that he had received a merit increase as recently as May 20, 1996.

On or about July 20, Flores was transferred from his position as a Perini 2 machine operator to that of working on skids. Farooq told Flores that he no longer needed him on this machine. Meanwhile, the Polish employee that Flores had been training on his Perini 2 machine replaced him on that machine. Once Flores stopped working on the Perini 2 machine, Farooq told him that he now would only be working 8 hours daily until 3:30 p.m. According to Flores, once he began working on the skids he became the frequent recipient of threats with Farooq constantly yelling at him and threatening to fire him if he did not perform some task.

On or about July 25, Jose Alberto received his "only written warning" by Farooq for leaving his machine unattended while it was running. Alberto explained that he needed to get supplies and to deliver the materials to another employee and had previously done this on a daily basis. Alberto testified that, in the past, he had left his machine running to get supplies and while Farooq observed this, he never gave Alberto a written warning or reproached him. The warning states, "[T]hat Alberto was spoken to many times" and Alberto refused to sign it as being "unfair" and "unjust."[10] The warning notice states that Alberto would be terminated next time and the section of the warning,

[3] The Respondent claims that this was an inadvertent payroll error and that the employees subsequently received their correct pay.

[4] Also among the employees who participated in the work action were, Hector Merlos, Joel Guzman, Edgardo Arguesta, Julio C. Rivas, Julio Rivera, and Alcides Henriquez.

[5] Roozrokh testified that while he did not know why the employees had failed to return to their jobs on Saturday, July 13, "maybe they were very tired because they were worked more hours," and that Farooq had told him on Monday, July 15, that Samuel Chavez had talked to the employees and they left together and punched out. It is reasonable to assume that under the circumstances that Farooq had advised Roozrokh of the reason for the walkout.

[6] However, in an affidavit given to a Board agent previously, Guzman made no mention of this statement being made by Farooq. Guzman explained this omission by stating that he did not include this because "I didn't remember it at the time."

[7] The employees who participated in the refusal to work overtime on July 12 were Hispanic. Employee Abelino Martinez also testified that he heard Roozrokh make such a threat a few days before July 30. Additionally, Elson Flores' affidavit given to a Board agent and admitted into evidence "conditionally," over the Respondent's objection, which will be discussed more fully hereinafter, states that he heard Roozrokh say that because employees left work early on July 12, he would fire all the Hispanics and hire only Polish and Indian employees. Moreover, when Hector Merlos complained to Roozrokh on July 15 "about the holiday [pay]," Roozrokh "treated us as if we were stupid, told us we were Communists."

[8] Alberto also testified that the night-shift operator who took over working his machine started to work at the 3:30 p.m. day shift effectively excluding Alberto from working overtime. Moreover, before July 12, Alberto worked an average of 25 hours overtime per week, Chavez worked 18.25 hours of overtime during the week ending July 14, and Flores worked about 29 hours of overtime per week.

Roozrokh testified that Chavez had told him that he advised Farooq that he no longer wished to work overtime. The Respondent in its brief acknowledges that "Chavez, Alberto and Flores did not work large amounts of overtime in the weeks following the July 12 walkout."

[9] Flores asserted that he always maintained his machine on the same level of cleanliness as other employees who failed to receive any wamings about this.

[10] The warning is written in English which Alberto does not understand. Nonetheless, the contents of the warning was not explained to him by the Respondent.

listing previous warnings, was left blank.[11] Alberto related that other employees, who worked on the same machine as he did, the "Bretty" machine, left their machines unattended while running, when necessary, such as to go to the bathroom or get a drink of water. Additionally, Alberto was never told by a supervisor that he could not leave his machine unattended and running while going for supplies.

On July 30, around 2 or 2:30 p.m., Chavez, Alberto, and Flores were called into Farooq's office where they were apprised that because "business was slow," the Respondent had to lay them off. Chavez testified that he told Farooq that he was wrong because he had worked for the Respondent for 5-1/2 years, and that Alberto and Flores had worked for over 4 years, and that about mid-July the Respondent had hired new employees.[12] Farooq responded that he knew nothing about this, but was following "the rules of the owner of the company," Mehdi Gabayzadeh. Chavez testified that although Farooq had told these employees that they were laid off he did not say that they would be recalled at a future date. Chavez demanded that he receive a letter of layoff which Farooq gave him. Chavez testified that while he worked for the Respondent, he did not believe that any employee had been laid off.[13]

After Chavez, Flores and Alberto left Farooq's office, they informed the other employees what had happened, and they and about 25 other employees decided to leave the plant at 3 p.m. in the afternoon to file a complaint with the New York State Labor Department in Hauppauge, New York.

According to the testimony of the General Counsel's witnesses, excluding that of Roozrokh,[14] the Respondent's business was far from slow and that there was actually more work present at the time. The evidence shows that, in fact, the Respondent was advertising for positions in July 1996. Alcides Henriquez and Baltazar Sarabia testified that more work was available than had been available previously. Abelino Martinez testified that around the time of the "layoff", he was required to work on his breaks and even on Sundays. Rivas testified that "it was very busy at work." He stated that in June and July 1996, Rivas asked Farooq if he could take his vacation and Farooq denied his requests, saying that there "was too much work." Similarly, Alcides Henriquez, during the week prior to July 30, asked Farooq if he could take his vacation on July 29, since his anniversary date was July 28. Henriquez testified that Farooq denied his request because "American Tissue was very busy at the time . . . they needed me to work."[15]

Chavez testified that work at the Respondent's Plant Avenue facility had not slowed down. Guzman testified that employees were required to work approximately 12 hour days from 7 a.m. to 7 p.m., overtime occurring after 3:30 p.m. According to the record evidence, for the week ending July 14, 128 employees each worked an average of 26 hours of overtime. For the week ending July 21, 111 employees each worked an average of 20 hours of overtime. For the week ending July 28, 114 employees each worked an average of 24 hours of overtime. Finally, for the week ending August 4, 1998, employees each worked an average of 25 hours of overtime.[16] The 2 weeks before July 30, Henriquez worked 25 and 26 hours of overtime, respectively, and Guzman worked 25 to 29 hours of overtime per week. Additionally, other employees, who were not laid off, were working overtime.

On July 30, after the other employees learned that Samuel Chavez, Jose Alberto, and Elson Flores had been laid off or "terminated," and despite Chavez telling them not to do so, approximately 25 employees joined Chavez, Alberto, and Flores in leaving the plant for the Labor Department.[17] Alberto testified that Rivas had told him that Roozrokh had called Rivas into his office and told him that "he was going to fire all the Hispanic employees who had been engaging in the walkout, and he was afraid of who would be next." Guzman also testified that "[s]ince [the Respondent] had already threatened to fire us, we punch our cards and we went to the Labor Department to place a complaint."

Guzman testified that Farooq told the employees that "anyone of you or those of you who punch your card, is being considered that he has abandoned his job." He also testified that Farooq had said that the employees who punched out were "stupid and that they were fired . . . and don't bother to return to work."[18] Baltzar Sarabia testified that she heard Farooq tell the employees before they punched out on July 30 that "if we left the factory or place of work, that we didn't have any right to come back to work." And Julio C. Rivas testified Farooq

[11] However, Albertos' personnel file shows that he received a merit increase on June 24, 1996.

[12] Alberto confirmed that less senior employees had not been laid off at that time. Employees Holman Flores and Elvin Campos had only been working for the Respondent for approximately 3 years. Employees Omar Henriquez, Harvey Martinez, and Ricardo Martinez had been working for the Respondent for less than 2 years. In mid-July 1996, the Respondent hired about five packers. Machine operators, a higher-level employee, usually start work as packers before becoming operators. Chavez, Flores, Alberto, Joel Guzman, and Alcides Henriquez had all worked as packers before becoming machine operators.

[13] The Respondent's "List of Terminations" appears to show that the first actual layoff took place on January 24, 1997.

[14] Samuel Chavez, Jose Alberto, Joel, Guzman, Hector Merlos, Abelino Martinez, Alcides Henriquez, Baltazar Sarabia, Julio C. Rivas, and Julio Rivera.

[15] Henriquez testified that while presumably he would not have come to work on Saturday, July 13, as part of the employees work action on July 12, Roozrokh called him at home, at about 8 or 9 o'clock and asked him to come to work on that day because the Respondent was very busy, and that, as an incentive, Roozrokh would pay him for the entire day, although it was already into the day when Roozrokh called him.

[16] The General Counsel asserts that the drop in the number of employees "was the result of the termination of the employees who participated in the concerted action on July 30."

[17] The evidence indicates that Samuel Chavez, Joseph Alberto, Elson Flores, Abelino Martinez, Baltazar Sarabia, Edgardo Arguesta, Julio Rivera, Hector Merlos, Holman Flores, Miguel Coraizaca, Julio Caesar Rivas, Julio C. Rivas, Victor Fuentes, Carlos Garcia, Humberto Martinez, Carlos Romero, Oscar Rivas, Elvin Campos, Joel Guzman, Alcides Henriquez, Emilio Pavon, Marcos Rivas, Esmelin Rivas, Mario Romero, and Ricardo Martinez went to the Labor Department.

[18] However, Guzman also failed to mention that Farooq allegedly made such a statement, in his affidavit. Guzman again explained that "[s]ometimes there are days and moments where you forget things."

had said that "anyone who left would be dismissed from their job."

After going to the N.Y.S. Labor Department on July 30 some of the employees returned to the plantsite that day but were denied entrance. Other employees attempted to return to work the following day but again were not allowed to enter the facility. The Respondent had hired security guards who were stationed at the plant "entrance in the parking area" and who were ordered not to allow the employees in to return to their jobs. The General Counsel's witnesses testified that they had never seen security guards on the Respondent's premises before.

As a result of not being allowed to return to work, and after consulting with an attorney who advised them to commence picketing, the employees formed a picket line on August 1 and picketed in the mornings, during weekends, and in front of the Respondent's premises for approximately 2 weeks.[19] Security was present during the entire time. General Counsel's witnesses testified that the employees goal in picketing was to have the Respondent allow these employees to return to work including Chavez, Alberto, and Flores. The employees who picketed carried signs saying, "Give Us Back Our Jobs/We Want Our Jobs Back"; "Latin Workers United Against Discrimination"; "Down With Discrimination/Stop Discrimination/No More Discrimination;" throughout the time of the picketing.

Chavez testified that on or about August 2, at approximately 10 a.m., Roozrokh's secretary, Angela Gribbin, approached the employees on the picket line and told them that Roozrokh would allow the employees to return to work one at a time if they signed a blank piece of paper, which the employees refused to do. The testimony of the General Counsels witnesses indicate a reluctance to sign a blank piece of paper out of fear.[20] The purpose of the signing of the alleged blank paper or any purported use thereof, was never explained in the record.

On or about August 2, a few hours after Gribbin approached the employees on behalf of Roozrokh, Chavez, Alberto, and Flores received letters signed by Roozrokh along with their pay checks and subsequently by mail stating:

> As you know, you were laid off on July 30, 1996, due to lack of work caused by a slowdown in business. Because of a current shortage of workers, American Tissue has a need for employees at the Plant Avenue facility. Therefore, we are recalling you from layoff. You should report to work at 7:30 a.m. on August 2, 1996.

Chavez testified that he did not respond to this letter because of the "injustices taking place before," which were "going to be worse," now and because returning to work would require his signing the blank piece of paper which Gribbin had proposed they do earlier that day. Alberto testified that he did not respond to the letter because employees recall letters were only sent to Chavez, Flores, and himself while the other employees who were out picketing had not received recall letters with their pay checks.[21]

Moreover, during the picketing the employees signed a petition requesting the transfer of employees Ghulam Farooq (a supervisor) and Oscar Hernandez, an inventory worker, because "There were lots of problems that had taken place regarding two supervisors." The petition was then handed to a "courier" to give to the company president.

The General Counsel called as one of its witnesses Shahram Roozrokh, the Respondent's vice president and plant manager. According to Roozrokh's testimony and documents offered by the Respondent,[22] in July 1996 the Plant Avenue facility had a high number of employees, 130 in the last week in July, and "significantly higher than the number of employees during the comparable period in 1995. Roozrokh testified that in late July the Respondent determined, for the following reasons, to layoff several employees at the Plant Avenue facility: the purchase of two new machines intended for the Plant Avenue facility but which actually were installed in a new building purchased in upstate New York and the intent to move other machines to this new site in the future; the Respondent suffered significant monetary losses from December 1995 through September 1996, although the Plant Avenue facility itself realized small profits in June and July 1996, these were down from larger profits experienced in April and May 1996; sales of products manufactured at the Plant Avenue facility fell "significantly short of sales forecasts during 1996."

Roozrokh testified that he chose Samuel Chavez for layoff because Chavez had informed him that he intended to return to El Salvador to operate his machine shop and because Chavez was a "lead operator" a position Roozrokh determined was unnecessary under the above circumstances.

Roozrokh related that he selected Elson Flores for layoff because of his poor work performance and unsafe work practices. Flores had refused to clean the saw on his machine after instructed to do so by his supervisor. According to Roozrokh, failure to clean the saw, which threw off sparks, created a significant safety hazard. Flores had received a warning for failure to clean the saw, and subsequently refused to wear a safety belt that was required equipment while working on the conveyor. Flores had also informed Roozrokh that he had another job. Roozrokh, however had not mentioned the other job or

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[19] Among the employees who picketed were Samuel Chavez, Jose Alberto, Joel Guzman, Elvin Campos, Emilio Pavon, Omar Enriquez, Elson Flores, Hector Merlos, Abelino Martinez, Alcides Henriquez, Edgardo Arguesta, Baltazar Sarabia, Julio C. Rivas, Julio Rivera, Oscar Rivas, Esmelin Rivas, and Sifredo Martinez.

[20] Guzman testified that towards the end of the picketing he was allowed to speak to Roozrokh. Roozrokh asked him his name, although he actually knew it and tried to "trick" Guzman into writing his name on a blank piece of paper. After Guzman signed the paper he then tore it up immediately, whereupon Roozrokh told him that "the work had slowed down and at this time he didn't have any work for me." Prior to this last remark, Roozrokh had asked Guzman under what conditions he would return to work and Guzman replied that all employees should be allowed to return to work and that the conditions of a petition signed by the picketing employees, more about which will appear hereinafter, be complied with.

[21] The Respondent acknowledged that only Chavez, Alberto, and Flores were sent such recall letters.

[22] While these charts and schedules were admitted into evidence, it should be noted that the documents from which they were prepared were never offered nor was the preparer thereof called as a witness to testify as to their preparation.

some of the incidents relating to the selection of Flores for layoff in his affidavit.

Roozrokh testified that he also chose Jose Alberto for layoff because of his unsafe work practices and poor performance. According to Roozrokh, beginning in April 1996, Alberto repeatedly was away from his machine while it was running and when the plant manager spoke to him about this he argued with him. Also in July, Alberto had committed a serious safety violation in by-passing the safety devices on the machine that he operated, and then argued with Roozrokh when confronted with this violation. Alberto received a written warning for leaving his machine again while it was running because of his unsafe practices, having received a prior warning in October 1995 for repeatedly failing to follow required procedures for operating and cleaning his machine. He had also had initiated a fight with another employee responsible for quality control, after the other employee questioned the quality of material made on Alberto's machine.

The General Counsel also called Ghulam Farooq, a supervisor of the Respondent's, who testified that Samuel Chavez, Elson Flores, and Jose Alberto were laid off because of a "slow down in business." Farooq stated that Chavez was also laid off because he was a "lead operator" and was not needed at the time.[23]

As indicated above, on July 30, 1996, the Respondent laid off Chavez, Flores, and Alberto telling them, that this was due to a slow down of business at the Plant Avenue facility. Roozrokh testified that because of the subsequent walkout by other employees, the need arose to call back these three employees and the Respondent therefore sent Chavez, Flores, and Alberto notices and letters to report to work on August 2, 2 days after the layoff. Evidence in the record indicates that the notices and letters were received by these employees on August 1.

Of the employees who left the plant with Chavez, Flores, and Alberto on July 30, the following employees subsequently returned to work: Jose Morales on August 2: Douglas Murillo on July 31; Holman Flores on August 5; Marcos Antonio Rivas; Julio Caesar Rivas, without interference by the security guard posted at the premises. As to the other employees who walked out of the plant on July 30, and were on the picket line, Roozrokh testified that they were sent certified letters[24] requesting them to return to work but they did not do so some for the reason given to the Respondent by Mario Romero, Julio C. Rivas, and Esmelin Rivas that they allegedly had or were getting better paying jobs; and others for the reason that they wanted the Respondent to transfer employees Ghulam Farooq and Oscar Hernandez out of the Plant Avenue facility. The petition dated August 7, 1996, signed by the employees who were picketing stated that "the workers who are currently picketing in front of the 110 Plant Avenue site of American Tissue Corporation, are willing to resume our jobs under the conditions we stated to you yesterday." This condition was the transfer of Farooq and Hernandez.[25] The Respondent alleges that the picketing employees never withdraw their demands for the transfer of Farooq and Hernandez or informed the Respondent that they were willing to return to work unless their conditions were met.

By letter dated February 10, 1997, the Respondent notified the picketing employees giving them the opportunity to return to their jobs but unconditioned on the transfer of Farooq and Hernandez. However, none of these employees returned to work.

Credibility

As to the credibility of the respective parties witnesses, after carefully considering the record evidence, I have based my findings on my observation of the demeanor of the witnesses, the weight of the respective evidence, established and admitted facts, inherent probabilities, and reasonable inferences which may be drawn from the record as a whole. *Gold Standard Enterprises*, 234 NLRB 618 (1978); *V & W Castings*, 231 NLRB 912 (1977); *Northridge Knitting Mills*, 223 NLRB 230 (1976). While the testimony of the parties respective witnesses at times evidenced instances of a lack of remembrance and at other times in their testimony with the lack of inclusion in their affidavits given to Board agents, yet I found that on balance, the testimony of the General Counsel's witnesses,[26] given in a forthright manner, was generally corroborative and consistent with each others and consistent with other believable evidence present in the record and therefore most credible. Further, based upon their demeanor, and other facts in the record I find these witnesses to be more trustworthy.

Moreover, while I do not discredit all of the testimony of Shahram Roozrokh, where it does not conflict with that of the General Counsel's witnesses, based upon his demeanor and that of Ghulam Farooq and Angela Gribbin, I found their testimony to be vague, less than credible, not believable and contrary to evidence and admitted facts in the record. Farooq especially proved to be suspect as an unreliable witness, changing his testimony when confronted with evidence to the contrary, while Gribbin's testimony was even inconsistent with stipulated facts.

As regards the affidavit of Elson Flores, which I admitted "conditionally," Section 804(b)(5)[27] of the Federal Rules of Evidence provides that the statement of a declarent unable to testify as a witness and to whom the hearsay exceptions in

[23] Farooq, at first, could not remember if he had told employees that Chavez was fired "because he was no good in the business," and that "the Union had left from here and we got a lot of shit from them." However, when confronted with a taped conversation with a meeting of night shift employees he admitted having made these statements. Farooq explained that he made the statement about the Union because the Respondent was experiencing threats and vandalism to employee property which it attributed to the Union.

[24] Although requested to do so, the Respondent failed to produce the return receipt for service of certified mail.

[25] The employees wanted Farooq transferred because of his "abusive treatment of workers. He constantly verbally abused workers with insults and exerted coercive pressure to work seven days a week." They sought Hernandez's transfer because of his "threats against workers. He had physically attacked two workers and had threatened numerous others."

[26] This would exclude the testimony of Shahram Roozrokh who was called as a witness initially by the General Counsel and then as a witness for the Respondent.

[27] Fed.R.Evid 804(b)(5) was effective until December 1, 1997; thereafter it was transferred to Rule 807.

Fed.R.Evid. 804(b)(1–4) do not apply,[28] the witnesses out of court statement may still be admitted if there are equivalent circumstantial guarantees of trustworthiness, Fed.R.Evid. 804(b)(5), known as the "residual exception" provides:

> A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.[29]

The party seeking to invoke the residual exception carries the burden of proving the "existence of the requisite guarantee of trustworthiness." *NLRB v. United Sanitation Services*, 737 F.2d 936 (11th Cir. 1984).

The Board has consistently viewed that the requirement of "equivalent circumstantial guarantees of trustworthiness" under Section 804(b)(5) has been met by an affidavit taken by a Board agent. *Colonna's Shipyard*, 293 NLRB 136 (1989); *Auto Workers Local 259 (Atherton Cadillac)*, 276 NLRB 276 (1985); *Canterbury Gardens*, 238 NLRB 864 (1978). However, the Board has indicated that such evidence "must be evaluated with maximum caution, only to be relied upon if and when consistent with extraneous, objective, and unquestionable facts." *Weco Cleaning Specialists*, 308 NLRB 310 (1992); *Industrial Waste Service*, 268 NLRB 1180 (1984); *United Sanitation Service*, 262 NLRB 1369 (1982); *Custom Coated Products*, 245 NLRB 33 (1979).

In *George E. Masker, Inc.*, 261 NLRB 118 (1981), the Board found that an affidavit was admissible under Fed.R.Evid. 804(b)(5) where the witness was unavailable within the meaning of the rule since the General Counsel was unable to procure his attendance by process or other reasonable means. In this case, the evidence shows that Elson Flores was in El Salvador at the time of the trial and that the General Counsel made every reasonable attempt to procure his attendance by subpoena served at various addresses including an address in El Salvador, and that there was no other practical option. Moreover, the relevant portions of the affidavit constitutes evidence of material facts, and that statement is more probative on the point for which it is offered than any other evidence which the General Counsel can obtain through reasonable efforts. *Consolidated Casinos Corp.*, 266 NLRB 988 (1983); *Justak Bros. & Co.*, 253 NLRB 1054 (1981), enfd. 664 F.2d 1074 (7th Cir. 1981).

Additionally, the Respondent questions the guarantee of the trustworthiness of the affidavit itself sufficient to bring it within the scope of Rule 804(b)(5). However, it appears that a person who willfully makes a false sworn statement to a Board investigator may be subject to a fine of up to $10,000 and/or imprisonment for up to 15 years. While it is reasonable to assume that when the Board agent takes an affidavit, the affiant understands that he is binding himself to tell the truth by swearing under oath to its truthfulness, although this does not necessarily mean that it is admissible unless he is somewhat aware of the penalty for perjury for lying *NLRB v. Sanitation Service*, 737 F.2d 936 (11th Cir. 1984). But also see *Justak Bros. & Co.*, supra.

In *Fenetrol, Inc.*, 251 NLRB 796 (1980), the administrative law judge, affirmed by the Board, stated:

> I think it is a fair reading of the legislative history of Rule 804(b)(5) and of the cases construing it to view it not in relation to Rule 804(b)(1) or to any of the other exceptions where a declarant is unavailable. Rule 804(b)(5) gives a court discretion where there is shown the necessity for receiving the hearsay evidence and where the circumstantial evidence is substantially consistent with the hearsay statement or otherwise indicates its trustworthiness. The Board in effect has adopted this same approach in considering hearsay evidence as it has held that the rules of evidence in the Federal courts are to be followed to the extent that they are practicable. See, e.g., *Alvin J. Bart and Co., Inc.*, 236 NLRB 242 (1978).

Also see: *U.S. v. Ward*, 552 F.2d 1080 (5th Cir. 1977), cert. denied 434 U.S. 850 (1977); *U.S. v. Lyon*, 567 F.2d 777 (8th Cir. 1977); *U.S. v. Medico*, 557 F.2d 309 (2d Cir. 1977).

Moreover, Fed.R.Evid. 804(b)(5) requires that the adverse party be apprised in advance of the hearing that the proponent intends to offer the affidavit, along with its particulars, including the name and address of the declarent, so that the adverse party can prepare to meet the evidence. The evidence shows that the General Counsel complied with this requirement. As soon as the General Counsel became aware that Elson Flores moved to El Salvador, the Respondents' counsel was notified,

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[28] (1) Former testimony; (2) Statement under belief of impending death; (3) Statement against interest; and (4) Statement of personal and family history. However, Fed.R.Evid 804(b)(5) requires that the statement not specifically covered by Fed.R.Evid 804(b)(1–4) exceptions to the hearsay rule "have equivalent circumstantial guarantees of trustworthiness."

[29] Fed.R.Evid. 807 provides:

Rule 807. Residual Exception

[Effective December 1, 1997]

A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarent.

provided with a copy of the affidavit, advised that the General Counsel intended to use it at trial, provided the Respondent with the affiants local and El Salvador addresses and all within enough time to prepare.

From all of the above, I find that the General Counsel has met the requirements of Fed.R.Evid. 804(b)(5) and that Elson Flores' affidavit should be admitted into evidence since the "general purposes of these rules and the interests of justice will best be served."

B. Analysis and Conclusions

1. The alleged violation of Section 8(a)(1) of the Act

The complaint alleges that the Respondent violated Section 8(a)(1) of the Act by threatening employees with discharge if they joined, supported or assisted Local 707 or engaged in other protected and concerted activities; denied its employees Samuel Chavez, Elson Flores, and Jose Alberto the opportunity to work overtime; issued written warnings to Elson Flores and Jose Alberto; and reassigned Elson Flores to working on skids and terminated; Chavez, Flores, Alberto, and numerous other employees to be named hereinafter. The Respondent denies these allegations.

Section 8(a)(1) of the Act provides that it shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of their statutory right to engage in, or restrain from engaging in concerted activity. It is well settled that the test of interference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on the employer's motive or on whether the coercion succeeded or failed. The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act. See *NLRB v. Illinois Tool Works*, 153 F.2d 811, 814 (7th Cir. 1946); *Overnight Transportation Corp*., 296 NLRB 669, 685–687 (1989), enfd. 938 F.2d 815 (7th Cir. 1991); *Southwire Co.,* 282 NLRB 916 (1987) (quoting *Hanes Hosiery, Inc.,* 219 NLRB 338 (1975)); *Fairleigh Dickinson University*, 264 NLRB 725 (1982), enfd. mem. 732 F.2d 146 (3d Cir. 1984); *American Freightways Co.,* 124 NLRB 146 (1959). In making the requisite determination, the Board considers the total context in which the challenged conduct occurs and is justified in viewing the issue from the standpoint of its impact on the employees. *NLRB v. E. I. du Pont & Co*., 750 F.2d 525, 528 (6th Cir. 2984). However, this provision is modified by Section 8(c) of the Act, which defines and implements the first amendment right of free speech in the context of labor relations. *NLRB v. Four Winds Industries*, 53 F.2d 75 (9th Cir. 1969). Section 8(c) permits employers to express "any views, arguments or opinions" concerning union representation without running afoul of Section 8(a)(1) of the Act if the expression "contains no threat of reprisal or force or promise of benefit." *NLRB v. Marine World USA*, 611 F.2d 1274 (9th Cir. 1980); *NLRB v. Raytheon Co.*, 445 F.2d 272 (9th Cir. 1971). The employer is also free to express opinion or make predictions, reasonably based in fact, about the possible effects of unionization on its company. *NLRB v. Gissel Packing Co.,* 395 U.S. 575, 618 (1969). In determining whether questioned statements are permissible under Section 8(c), the statements must be considered in the context in which they were made and in view of the totality of the employer's conduct. *NLRB v. Marine World USA,* supra, *NLRB v. Lenkurt Electric Co.,* 438 F.2d 1102 (9th Cir. 1971). Also recognized must be the economically dependent relationship of the employees to the employer and the necessary tendency of the former, because of the relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear. *NLRB v. Gissel Packing Co.,* supra at 617; *NLRB v. Marine World USA,* supra.

The Board has held that "there can be no doubt that there is no more vital term and condition of employment than one's wages, and employee complaints in this regard clearly constitute protected activity." *Cal-Walts, Inc.,* 258 NLRB 974, 979 (1981). According to the credited testimony herein when employees received their paychecks and noticed that they had been underpaid for the week including the July 4th holiday, about 15 employees decided to leave work early on Friday, July 12, at 3:30 p.m. and not to work overtime that day nor return to work the following day, Saturday, July 13. Since the Respondent acknowledged the underpayment, alleging it was inadvertent, and then corrected it after the employees returned to work on July 15, it is reasonable to assume that the purpose of the walkout was in protest over the employees failure to receive their proper wages and that the Respondent was aware of this.[30] Therefore, I find that on July 12, the employees engaged in protected concerted activities. See *SME Cement, Inc.*, 267 NLRB 763 fn.1 (1983); *Embossing Printers*, 268 NLRB 710 (1984); *Polytech, Inc.*, 195 NLRB 695 (1972).

The credited testimony of the General Counsel's witnesses establishes that after July 15, Shahram Roozrokh and Ghulam Farooq threatened to discharge those employees who had participated in the July 12 walkout and refusal to come to work on July 13. Employee Joel Guzman testified that after Roozrokh had asked him who was responsible for the walkout on July 12, Roozrokh threatened to fire all these employees Roozrokh told Julio Rivas on July 15 that he was going to fire all the "Hispanic" employees who took part in the refusal to work overtime on July 12, and Abelino Martinez testified that he had heard Roozrokh make the same threat a few days later.[31] Moreover, Elson Flores in his affidavit stated that he had heard Roozrokh say that he would fire all Hispanic employees who left work early on July 12, and subsequently hire only Polish and Indian employees. Also Farooq told Guzman that "Samuel Chavez was a cancer to the company and would be terminated" as a result.[32] See *Putnam Community Hospital*, 224 NLRB 1066 (1976).[33]

[30] If not sooner, then at least on July 15, when Farooq told Roozrokh that Chavez had spoken to the employees on July 12 after which they punched out together and left the plant.

[31] See *Advance Cleaning Services*, 274 NLRB 942 (1985).

[32] The record evidence shows that the Respondent considered Chavez the main union adherent and the employee who initiated the July 12 walkout and refusal to work overtime by the employees.

[33] The alleged violations of Sec. 8(a)(1) of the Act wherein the Respondent denied overtime work to Samuel Chavez, Elson Flores, and Jose Alberto, issued written warnings to Elson Flores and Jose Alberto, reassigned Elson Flores to working on skids, and terminated employees

By the above actions of the Respondent, the Respondent has been interfering with, restraining and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.[34]

2. The alleged violations of Section 8(a)(1) and (3) of the Act

The complaint alleges that the Respondent denied its employees Samuel Chavez, Elson Flores, and Jose Alberto the opportunity to work overtime; issued written warning notices to Elson Flores and Jose Alberto, reassigned Elson Flores to working on skids, and discharged Chavez, Flores, Alberto, and other employees because these employees engaged in protected concerted activities on July 12, 13, and 30, and the Respondent engaged in such action to discourage employees from engaging in such activities or other mutual aid or protection, in violation of Section 8(a)(1) and (3) of the Act. The Respondent denies these allegations.

Section 8(a)(3) of the Act make it an unfair labor practice for an employer to discriminate "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." Under the test announced in *Wright Line*, 251 NLRB 1083 (1960), enfd. 662 F.2d 899 (1st Cir. 1981), cert, denied 455 U.S. 989 (1982), and approved by the Supreme Court in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), a discharge is violative of the Act only if the employee's protected conduct is a substantial or motivating factor for the employer's action. If the General Counsel carries his burden of persuading that the employer acted out of antiunion animus, the burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employees had not engaged in protected activity. *Office of Workers Compensation Programs v. Greenwich Collieries*, 114 S.Ct. 2552–2558 (1994); *Southwest Merchandising Corp. v. NLRB*, 53 F.3d 1334 (D.C. Cir. 1995); *Manno Electric*, 321 NLRB 278 fn. 12 (1996); *Wright Line*, supra. Also see *J. Huizinga Cartage Co. v. NLRB*, 941 F.2d 616 (7th Cir. 1991).[35] However, when an employer's motives for its action are found to be false, the circumstances may warrant an inference that the true motivation is an unlawful one that the employer desires to conceal. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1966); *Linestone Apparel Corp.*, 255 NLRB 722 (1981); *Golden Flake Snack Foods*, 297 NLRB 594, 595 fn. 2 (1990). See also *Peter Vitale Co.*, 313 NLRB 971 (1994). The motive may be inferred from the total circumstances proved. Moreover, the Board may properly look to circumstantial evidence in determining whether the employer's actions were illegally motivated. *Association Hospital del Maestro*, 291 NLRB 198 (1988)' *White-Evans Services Co.*, 285 NLRB 81 (1987); *NLRB v. O'Hare-Midway Limousine Service*, 924 F.2d 692 (7th Cir. 1991). That finding may be based on the Board's review of the record as a whole. *ACTV Industries*, 277 NLRB 356 (1985); *Heath International, Inc*., 196 NLRB 318 (1972).

In carrying its burden of persuasion under the first part of the *Wright Line* test the Board requires the General Counsel first to persuade that antiunion sentiment was a substantial or motivating factor in the challenged employer decision. *Manno Electric, Inc.*, supra fn. 12; *Wright Line*, supra. In establishing unlawful motivation, the General Counsel must prove not only that the employer knew of the employees union activities or sympathies, but also that the timing of the alleged reprisals was proximate to the protected activities and that there was antiunion animus to "link the factors of timing and knowledge to the improper motivation." *Hall Construction v. NLRB*, 941 F.2d 684 (8th Cir. 1991); *Service Employees Local 434-B*, 316 NLRB 1059 (1995); *American Cyanamid Co.*, 301 NLRB 253 (1991); *Abbey's Transportation Services*, 284 NLRB 698 (1987), enfd 837 F.2d 575 (2d Cir. 1988).

In this case the evidence shows that the Respondent was aware of the protected concerted activities of the employees who walked out on July 12 and refused to work overtime and refused to return to work on July 13. Chavez, Flores, and Alberto were the most active supporters of the Union's organizing campaign and the Respondent blamed Chavez for prompting the walk out and refusal to work overtime by the employees. Moreover, the Respondent threatened to discharge these employees who participated in the July 12 and 13 protected concerted activities. Additionally, the subsequent layoff of Chavez, Flores, and Alberto, and the totality of the circumstances herein, supports a strong inference of knowledge by the Respondent.

Additionally, there is also abundant evidence of animus toward the employees protected concerted activities and/or their Union sympathies by the Respondent in the threats and anti-Union statements made by Roozrokh and Farooq to its employees regarding their protected concerted activities and/or their support of Local 707 found herein to be violations of Section 8(a)(1) of the Act.[36] The violations found and the antiunion statements made more than meet the General Counsel's burden of proof on the animus issue.

Moreover, the evidence shows that on July 30, soon after the employees walked out on July 12 and refused to work overtime and failed to report for work on July 13, the Respondent laid off Chavez, Flores, and Alberto. Additionally, the Respondent transferred Flores from his position of machine operator to the lesser position of working on skids; issued written warnings to Flores and Alberto; and denied Chavez, Flores, and Alberto the opportunity to work overtime. Since I find the Respondent's actions in this regard to be also violations of Section 8(a)(1) of the Act as well as Section 8(a)(1) and (3) of the Act, I am persuaded that the General Counsel has established that a motivating factor in the Respondent's actions against the employees was their protected concerted activities. This is supported by

will be discussed hereinafter in the section on alleged violations of Sec. 8(a)(1) and (3) of the Act.

[34] See, *Supervisor Warehouse Grocer*, 277 NLRB 18 (1985); *Rayglo Corp.*, 274 NLRB 18 (1985.

[35] An employer simply cannot present a legitimate reason for its actions but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct. *T & J Trucking Co.*, 316 NLRB 771 (1995); *GSX Corp. v. NLRB*, 918 F.2d 1351 (8th Cir. 1990).

[36] For example, Farooq specifically called Chavez a "cancer to the company" stated that "he did not like leaders" and stated that the "Union gave Respondent a lot of 'shit.'"

the clear evidence of the Respondent's animus towards the employees who engaged in such activities, the Respondent's knowledge of their protected concerted activities and their support and sympathy for the Union, and the timing of Respondent's above actions relative to the employees protected concerted activities.[37] *Wright Line*, supra. Accordingly, the burden shifts to the Respondent to establish that its actions taken against the employees would have been taken even in the absence of their protected concerted activities. *Office Worker's Compensation Program v. Greenwich Collieries*, 114 S.Ct. 2552–2558 (1994); *Wright Line*, supra. Also see *American Cyanamid*, supra; *Dlubak Corp*., 307 NLRB 1138 (1992), enfd. 5 F.3d 1488 (3d Cir. 1993). The Respondent has failed to carry its burden in this regard.

C. The Opportunity to Work Overtime

The Board had found that an employer violates Section 8(a)(3) of the Act by denying an employee the opportunity to work overtime. *Mathews Ready Mix, Inc*., 259 NLRB 739 (1981). The Respondent in support of its assertion that it has rebutted the General Counsel's prima facie case, alleges that "the evidence, although controverted, strongly favors the Respondent's position that there was no discrimination on the basis of protected activity." I do not agree.

Prior to the employees protected concerted refusal to work overtime on July 12, Chavez, Flores and Alberto had worked many hours of overtime per week, as did other employees. After they returned to work on July 15, the Respondent ceased permitting these three employees to work overtime or substantially reduced their overtime hours. Instead, the Respondent had night shift employees report to work earlier which effectively prevented them from working overtime. The Respondent also transferred Flores to a different job and his hours which prevented him from working overtime. The Respondent points to the fact that other employees who participated in the walk out and refusal to work overtime on July 12 and 13 also had received little or no overtime. However, Chavez, Flores, and Alberto the most active of the employee Local 707 adherent, had their overtime eliminated or reduced even while the other employees, even those who had participated in the July 12 walkout and refusal to work overtime worked the same or a reduced number of overtime hours and all the Local 707 adherents need not be discriminated against to establish a discriminatory motive against these employees.[38]

After consideration of the above, I find that the Respondent violated Section 8(a)(1) and (3) by denying Chavez, Flores, and Alberto the opportunity to work overtime.

Additionally, discrimination against some of the employees who engaged in protected concerted activity, especially those most active and not against other employees who engaged in such action does not necessarily establish that the Respondent did not discriminate against Chavez, Flores, and Alberto regarding overtime.[39] The Board has held that not all the employees who participated in concerted activities need be discriminated against to establish a violation of the Act.

D. The Issuance of Written Warnings

It is well established that the issuance of a written disciplinary warning for discriminatory reasons violates Section 8(a)(1) and (3) of the Act.[40] The Respondent asserts that the disciplinary actions imposed upon Jose Alberto and Elson Flores were fully justified, and not the product of any discriminatory motive. The Respondent alleges that Alberto received his warning notice of July 25, 1996, because he left his machine unattended while running, "a clear violation of Company rules that he had been warned about many times." However, Alberto's credited testimony shows that other employees regularly left their machines unattended and running while they went to the bathroom, to drink water and to obtain supplies necessary to perform their job functions without being given written warnings for this. While the written warning he was given, was consistent with company rules, its application was inconsistent vis-à-vis with the treatment of other employees. The timing of the written warning was also a factor. Additionally, Alberto testified that he was never told that he could not leave his machine when the purpose was to obtain supplies needed to perform his work. Moreover, this warning came soon after Alberto had engaged in protected concerted activity. Such disparate treatment in the existing context of animus is sufficient to establish discriminatory motivation.[41] Also, it is interesting to note that Alberto with all his alleged shortcomings had received a merit increase as recently as May 20, 1996.

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[37] In *Downtown Toyota*, 276 NLRB 999, 1014 (1985), the administrative law judge, affirmed by the Board, indicated that in order for the General Counsel to establish a prima facie case, under *Wright Line*, supra, it must be shown that the Respondent's alleged unlawful violation of Sec. 8(a)(1) and (3) of the Act "had the effect of encouraging or discouraging membership in a labor organization. *WMUR-TV*, 253 NLRB 697 (1980). The Board may infer this if it is reasonably foreseeable that it will have an adverse effect on employee rights. *Radio Officers Union v. NLRB*, 347 U.S. 17 (1954).

[38] *McGaw of Puerto Rico, Inc*. 322 NLRB 438 (1996); *J. T. Slocomb Co*., 314 NLRB 231 (1994); *LWP, Inc*., 295 NLRB 766 (1989). Moreover, the timing of the Respondent's refusal to allow Chavez, Flores, and Alberto to work overtime soon after their protected concerted activities on July 12 also coincided with their involvement in the Local 707 organizing campaign. In *Dr. Frederick Davidowitz*, 277 NLRB 1046 (1985), the Board found timing to be a key element. See the *George A. Tomasso Construction Corp*., 316 NLRB 738 (1995).

[39] Roozrokh testified that Chavez' overtime ceased because he had told Farooq that he no longer wanted to work overtime. Chavez denied having told Farooq this. I do not credit Roozrokh's testimony as to this for the reasons stated before regarding credibility. The Respondent offered no explanation as to why Flores and Alberto's overtime was eliminated or substantially reduced. See *O.K. Machine & Tool Corp*. 251 NLRB 208 (1980), enfd. 685 F.2d 425 (2d Cir. 1982), where the Board found that there was no lack of overtime and that the employer did not offer an explanation as to why the employees denied overtime constituted a unique group of employees as to justify such action. The employees affected had worked a substantial amount of overtime before the protected activity and then were subsequently denied the opportunity to do so. Also see *Mathews Ready Mix, Inc.*, supra.

[40] *Astro Tool & Die Corp*., 320 NLRB 1157 fn. 1 (1996); *Advance Transportation Co*., 310 NLRB 930 (1993).

[41] *APA Transport Corp*., 285 NLRB 928 (1987). Also see *Krysor Cadillac*, 309 NLRB 237 fn. 1 (1992); *Advance Transportation Co*., 310 NLRB 930 (1993).

Elson Flores was also given a written warning. Again the Respondent asserts that this was "fully justified because Flores regularly failed to keep the area around his machine clean and the saw which was a part of it." Since the saw threw off sparks, it was a fire hazard to the employees in the plant. When Flores attempted to explain to Farooq that the machine was complicated Farooq stated that "it had already been decided" that he receive this written warning. Moreover, the Respondent's purported reason for issuing the written warning does not stand scrutiny since Flores had been previously maintaining his machine in the same manner without any warning as had other employees, similarly. Additionally, just prior to Flores becoming very active in the Local 707 giving authorization cards to employees in July 1996, he had received a merit increase on May 20, 1996. The timing of the written warning soon after his concerted activities, the disparate treatment of Flores, and the Respondent's established animus is sufficient to show discriminatory motivation.

Based on the above I do not find that the Respondent has rebutted the prima facie case established by the General Counsel and therefore I conclude that when the Respondent issued warning notices to Jose Alberto and Elson Flores it violated Section 8(a)(1) and (3) of the Act.[42]

E. Reassignment of Elson Flores

The evidence shows that Elson Flores had worked as a machine operator for several years, up until the time he participated in the July 12 protected concerted action and until he started distributing authorization cards for Local 707 in mid-July. Then on July 20 he was transferred from his position as a "Perini 2" machine operator to working on skids, an unskilled and less desirable job. Although Farooq told him he was no longer needed on his machine, Flores was replaced by an employee whom Flores himself had trained on this machine and who was hired after the concerted action on July 12. Moreover, when Flores stopped working on this machine and started working on skids, Farooq told him he would no longer receive any overtime work and Farooq constantly yelled and threatened him with discharge if he did not perform same reassigned task.

The Board had found that it is a violation of Section 8(a)(1) and (3) of the Act to transfer an employee because of his union or protected concerted activities.[43]

From the foregoing, I am persuaded that the General Counsel has establishes that anti-union sentiment was a motivating factor in the change in the job duties of Elson Flores from machine operator to working on skids, based on evidence of his protected concerted activities and support for the Union. Moreover, the evidence in the record of the Respondent's animus towards the employees who had engaged in concerted activities and supported the Union, the Respondent's knowledge of Flores protected concerted activities and/or support for the Union, and the timing of the Respondent's challenged decision proximate to Flores protected activities substantiate this.[44] The burden now shifts to the Respondent to show that it would have taken the same action in changing Flores job duties, even in the absence of his protected concerted activities.[45] Respondent has failed to rebut the General Counsel's strong prima facie case and has not met its burden under *Wright Line* and therefore when the Respondent reassigned Elson Flores because of his protected concerted activities from a machine operator to a lesser position involving the handling of skids it violated Section 8(a)(1) and (3) of the Act. *Wright, Line*, supra. *GSX Corp. v. NLRB*, supra. Also see *Raytheon Co.*, supra, and case cited therein.

F. The Termination of Chavez, Flores, Alberto, and Other Employees

The complaint alleges that the Respondent discharged Chavez, Flores, and Alberto and other employees[46] on July 30, 1996 because they engaged in a work stoppage on July 12 and a strike on July 30 and engaged in other protected and concerted activities, and in order to discourage employees from engaging in such activities or other activities for the purpose of collective bargaining or other mutual aid or protection.

Samuel Chavez, Elson Flores, and Jose Alberto were the main Union adherents at the Plant Avenue facility and the perceived leaders of the July 12 walkout and refusal to work overtime, especially Chavez, and the record evidence establishes that the Respondent was aware of this. The evidence also shows that soon after the July 12 concerted action,[47] which coincided with the peak of the Local 707 organizing campaign, the Respondent demonstrated its animus towards these employees threatening employees with discharge if they supported the Union or engaged in concerted activities,[48] denying Chavez Flores and Alberto the opportunity to work overtime, reassigning Flores from his position as a machine operator to a less desirable position working on skids, issuing Flores and Alberto written warnings, and then on July 30, laying off ad/or discharging Chavez, Flores, and Alberto and other employees who engaged in picketing and a strike. The General Counsel alleges that these circumstances constitute a prima facie showing of discriminatory discharge and I agree.[49] Terminating employees

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[42] *Wright Line*, supra.

[43] *APA Transport Corp.*, supra; *Mathews Ready Mix, Inc.*, supra. *Ford Paint & Varnish Co.*, 264 NLRB 1189 (1982).

[44] *Wright Line*, supra.

[45] *Office Workers Compensation Programs v. Greenwich Colleries*, supra; *Wright Line*, supra.

[46] Joel Guzman, Abelino Martinez, Carlos Garcia, Ricardo Martinez, Baltazar Sarabia, Esmelin Rivas, Miguel Coraizaca, Edgardo Arguesta, Hector Merlos, Julio Cesar Rivas, Julio C. Rivas, Julio Rivas, Sifredo Martinez, Humberto Martinez, Oscar O. Rivas, Mario Romero, Marcos Rivas, Alcides Henriquez, "and approximately five other employees, whose names are presently unknown."

[47] In *Vic Tanny International, Inc.*, 232 NLRB 353 (1977), affd. 662 F.2d 237 (6th Cir. 1980), citing *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962), the Board held that:

> The spontaneous banding together of employees in the form of a work stoppage is a manifestation of their disagreement with the employers conduct is clearly protected activity.

The Supreme Court also held in Washington Aluminum co., supra that the foregoing is true, even if the walkout is unnecessary or unwise.

[48] The Board has found that prior threats are key factor in concluding that an employer engaged in a discriminatory discharge in violation of Sec. 8(a)(1) and (3) of the Act. *Holiday Inn-Glendale*, 277 NLRB 1254 (1985).

[49] The Board has also consistently found that timing is a significant factor in determining whether the employer has violated Sec. 8(a)(3) of

because of their protected concerted activities presents a classic example of a violation of Section 8(a)(3) of the Act.[50] The burden then shifts to the Respondent to show that it would have taken the same action against these employees even in the absence of their protected concerted activities. The record shows that the Respondent considered Chavez to be responsible for the July 12 concerted activity when the employees walked out and he, Flores and Alberto to be the main union adherents, as well.[51] In *Vic Tanny International*, supra, the Board concluded that the discharge was motivated, at least in part, by the employee's participation in a walkout, since the Respondent had told the employees that they "laid themselves open to discharge for walking off the job." In the instant case Roozrokh told the employees who had walked out on July 12 and refused to work overtime on that day and the next that he was going to fire them because they engaged in a walkout. Again on July 30 when employees were about to leave the plant to protest the layoff of Chavez, Flores, and Alberto to the New York State Labor Department, Farooq told them that they would be considered to have "abandoned this job" and that they were "stupid and that they were fired . . . and don't bother to return to work."[52] After these employees returned to the plant that day they were precluded from entering the facility by security guards stationed at the premises and hired by the Respondent.

I therefore find that the Respondent has failed to rebut the General Counsel's prima facie showing that it unlawfully terminated Chavez, Flores and Alberto and the other employees on July 30.[53]

The Respondent asserts that the economic considerations that led to the layoff of employees at the Plant Avenue facility were (1) the unusually high number of employees at the facility; (2) the decision to send new machinery originally intended for Plant Avenue to the new facility in upstate New York; (3) substantial losses suffered by the Company in 1996; and (4) the failure of sales of products manufactured at Plant Avenue to meet the Company's sales forecast. The Respondent also alleges that Chavez was chosen for layoff because he had informed Roozrokh that he intended to return to El Salvador to run his own machine shop and that he was no longer needed as a "lead" employee. Flores and Alberto were selected because of their unsatisfactory work performance.

In considering the above, I do not find that the evidence sustains the Respondent's assertions. The record shows that at the time of the "layoff" there was plenty of work available. Employees worked an average of 25 hours of overtime, the Respondent had recently hired new employees, the Respondent was advertising for new employees, at the time and the Respondent had denied employees from taking their vacations in June and July on their anniversary dates because of the amount of work present. Moreover, layoffs were unprecedented with the Respondent's records, showing that the first actual layoff occurred on January 20, 1997. Also, as regards the projected transfer of the two new machines, Chavez, Flores, and Alberto had been working for the Respondent, obviously on other machines for several years, and the purchase of these machines, not installed at the Plant Avenue facility, is of limited consequence. Moreover, Chavez, Flores, and Alberto were laid off and terminated in the middle of the year, and there was no way the Respondent could know what actual sales for the year would be at that time and these forecasts were applicable to the entire company, since there was no evidence introduced for the specific breakdown for the Plant Avenue facility, and sales projections were to be made for only specific products which Chavez, Flores, and Alberto never or hardly worked on.

The Respondent also claimed that it suffered substantial losses in 1996. Documents in evidence show that the Respondent's pretax profits had been negative since December 1995 and there were no layoffs until after the Union's organizing campaign commenced and after the employees engaged in protected concerted activities. In fact, the pretax profit was less negative at the time of the "layoff" than in January, March, and April 1996. Moreover, while profits were down from larger amounts in April and May 1996, the Plant Avenue facility showed a profit although smaller. It would also appear to me that if there was a need for a layoff, the logical selection of employees for layoff would be by seniority.

The Respondent additionally alleges that the reason for selecting Samuel Chavez for "layoff" was that Chavez had told Roozrokh that he planed to move back to El Salvador at the end of 1996. Chavez credibly testified that while he had informed Roozrokh that he was going to move to El Salvador in late 1995 which was many months before the layoff, it was obvious in July 1996 that Chavez had not moved and the Respondent had no way of knowing when he would actually take such a step.

The Respondent asserts that Flores and Alberto were selected for layoff because of work performance problems, which had resulted in written warnings. However, despite their alleged poor performances, these employee received merit increases soon before their layoff as discussed hereinbefore and Roozrokh claimed that Flores had also told him that he had another job which paid more. However, Roozrokh admitted that he had failed to include this and some of the other incidents in his affidavit which purported to be an explanation concerning Flores selection for layoff.

While the Respondent insists that Chavez, Flores, and Alberto were laid off and not terminated the evidence shows differently. When an employer's motives are found to be false, the circumstances may warrant an inference that the true motivation is an unlawful one that the employer desires to conceal.[54]

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the Act. *Dr. Davidowitz*, supra; *Gurley Refining Co.*, 285 NLRB 38 (1987).

[50] *Wright Line*, supra.

[51] In *Photo Drive Up*, 267 NLRB 329 (1983), the administrative law judge affirmed by the Board stated that, "The Respondent's action against [her], the most prominent union activist, would serve as a vivid reminder to the Respondent's employees not to assist or support the Union now or in the future."

[52] Other employees testified to similar statements made by Farooq; such as, "[I]f we left the factory or place of work, that we don't have the right to come back to work. Also that "anyone who left would be dismissed from their jobs."

[53] *Wright Line*, supra.

[54] *Shattack Denn Miming Corp. v. NLRB*, supra; *Limestone Apparel, Inc.*, supra; *Golden Flake Snach Foods*, supra.

It is clear from the record that the Respondent sought to terminate Chavez, Flores and Alberto because of their concerted and Union activities.

In view of the above, I find that the Respondent has failed to demonstrate that it would have taken the same action against Chavez, Flores and Alberto, in the absence of their protected concerted activities. The Respondent has therefore violated Section 8(a)(1) and (3) of the Act.[55]

The evidence herein also establishes that on July 30 and after hearing about the layoff of Chavez, Flores, and Alberto, by the Respondent the employees decided to leave the plant and seek assistance from the New York State Labor Department in securing the reinstatement of these three employees. The Employees action in this regard constituted protected concerted activities. While the employees were punching out the Respondent threatened to preclude them from returning to their jobs if they left.[56] Moreover, after the employees returned to the plant, security guards hired by the Respondent, would not allow them to enter the plant and resume their work.

As a result of not being able to return to work the employees formed a picket line on August 1 and picketed for approximately 2 weeks. The evidence herein shows that the initial reason for the employees walkout on July 30 was to secure the reinstatement of Chavez, Flores, and Alberto. However, when they were prevented from returning to work the reason for picketing on August 1 was to allow all the employees who walked out on July 30 to return to work. This is supported by the wording on the picket signs carried by the picketeers.[57]

From the above I find that the General Counsel has established a prima facie showing of unlawful motivation in discharging the employees who left the plant on July 30. The Respondent knew of the employees protected concerted activities and their union activities or sympathies, the timing of the alleged reprisals was proximate to the protected activities and the Respondent harbored antiunion animus to "link the factors of timing and knowledge to the improper motivation."[58]

The Respondent also asserts that on July 30, the Respondent unconditionally recalled Chavez, Flores, and Alberto back to work but they refused the offer.[59] The Respondent also contends that it offered unconditional reinstatement to all picketing employees through Angela Gribbon, Roozrokh's secretary.[60]

In *Cub Branch Mining*, 300 NLRB 57, 59 (1990), the administrative law judge, affirmed by the Board, stated, "[O]rdinarily, any management action detrimental to participants in a protected work stoppage is sufficiently destructive of employee rights to be presumptively unlawful."[61] As such, at a minimum, the employer is impelled to substitute an overarching business justification.[62] As found above, the Respondent has failed to do so.

Moreover, in *Dirt Diggers, Inc*., 274 NLRB 24 (1985), the Board affirmed the administrative law judge in finding that the refusal of employees to work and then leave the premises to picket is protected concerted activity:[63] In *Dirt Diggers Inc.*, supra the administrative law judge quoted:

> Unrepresented as well as represented employees who refuse to work and leave their employers premises in an effort to secure more pay are engaged in "mutual aid or protection" within the meaning of Section 7 of the Act: Even if the walkoff is unnecessary and unwise, as the United States Supreme Court said in *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962): ". . . it has long been settled that the reasonableness of workers' decisions to engage in concerted activity is irrelevant to the determination of whether a labor dispute exists or not." Though the word "quit" was used by at least one employee, it is manifest from the context in which the walkout arose that the employees were using the walkout in an attempt to achieve their wage demands and were not voluntarily terminating their employee status. The employees made the purpose of their action plain to Respondent and Respondent was not free to treat the walkoff as a "quit." Cf. *Universal Insulation Corp.v. NLRB*, 361 F.2d 406, 408 (C.A. 6, 1966), enfg. 149 NLRB 1397; *Union Camp Corp*., 194 NLRB [933]. I fine that the eight employees engaged in a strike.

While in the above case the employees effort was directed towards securing more pay, in the present case it was directed towards the reinstatement of Chavez, Flores, and Alberto and then all the employees on the picket line. Additionally, the employees never indicated their resolve to quit their jobs but

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[55] *Wright Line*, supra.

[56] Alberto testified that Roozrokh had told Rivas that he would fire all the Hispanic employees who engaged in the walkout. Guzman testified that since the Employer had already "threatened to fire is," the employees had punched out. Guzman also testified that Farooq had told the employees on July 30 that anyone who punches out would be considered to have "abandoned" his job, and that they were also "fired . . . and don't bother to return to work." Baltazar Sarabia testified that Farooq told the employees on July 30 that if they "left the factory or place of work, that we didn't have any right to come back to work" Julio C. Rivas also testified that Farooq had told the employees that "anyone who left would be dismissed from their jobs."

[57] The picket signs stated, "Give Us Back Our Job/We Want Our Jobs Back"; "Down With Discrimination/Stop Discrimination . . ."; and "Latin Workers Against Discrimination."

[58] *Hall Construction v. NLRB*, supra; *Service Employees Local 434-B*, supra; *American Cyanamid Co*., supra.

[59] The Respondent alleges that Carlos Romero, Humberto Martinez, Julio C. Rivas, and Esmelin Rivas allegedly told the Respondent that they had better paying jobs and refused to return to work. However, Rivas testified that he refused to return to work because of the discriminatory termination of Chavez, Flores, and Alberto.

Chavez testified that he refused because he felt that the "injustices taking place before" would worsen and because he would be required to return to work on the condition that he sign a blank piece of paper which Gribbon had proposed as a requirement to return to work earlier on August 2. Alberto related that he did not return to work on August 2 because only Chavez, Flores and Alberto had received reinstatement letters and no other employees who picketed.

[60] Romero testified credibly that Roozrokh offered him a raise if he would stop supporting his co-workers on the picket line. He also testified that Roozrokh had refused to allow two other employees who wanted to return to work because he had seen Carlos Romero and Sifredo Martinez on the picket line.

[61] Also see *Vic Tanny*, supra.

[62] *Great Dane Trailers*, 388 U.S. 26 (1967).

[63] *NLRB v. Washington Aluminum Co*., 370 U.S. a (1962); *Meyers Industries*, 268 NLRB 493 (1974).

instead were told by Farooq that if they left to picket they would be considered to have done so, and that they would not be allowed to return to work. Moreover, the employees testified that the Respondent told some of the strikers who wanted to return to work that they were observed striking and therefore would not be allowed to return to their jobs.

The Respondent asserts that it made unconditional offers to Chavez, Flores and Alberto and later to the striking employees on the picket line to return to work. However, during the first week of picketing, on August 2, at about 10 a.m. the Respondent told Chavez, Flores, and Alberto, that they could return to work if they signed a blank piece of paper. The Respondent also made this offer to the other picketing employees. While the Respondent claims this is unbelievable and thought up subsequently for purpose of this trial, it is not as far-fetched as it seems. First, all the employees all testified as to this offer, and as to their fear of what the Respondent could do with them, and the blank sheet of paper could be used for many reasons, since once signed, it could be used as a resignation form or discharge when the upper portion was filled in. Be that as it may, it indicates that the Respondent's offer of reinstatement was not unconditional,[64] but conditioned on the employees signing the blank document.

The Respondent also asserts that the purpose of the picketing was to secure the transfer of Ghulam Farooq and Oscar Hernandez, a supervisory and nonsupervisory employee, respectively, and that thereafter the employees never made an unconditional offer to return to work, "much less that such an unconditional offer was communicated to the Respondent." However, the Respondent's assertion aside the employees did present a petition to the Respondent requesting such action.[65] The Respondent also asserts in its brief that as a matter of law an unconditional request for reinstatement is an essential prerequisite to a finding of unlawful refusal to reinstate.[66] The Respondent states that the picketing employees made no unconditional offer to return to work, nor is there any evidence in the record that such a request would have been futile under the circumstances, therefore, the Respondents' employees are not entitled to reinstatement.[67]

The Respondent continues:

> Even if the strikers had withdrawn their demands for transfer of other employees and made an unconditional offer to return to work, which they clearly did not do, Respondent would have been justified in refusing to return the employees to work. The employees engaged in unprotected activity by striking in order to compel the Respondent to transfer management and non-management employees out of the plant. The Second Circuit Court of Appeals had held that "[e]mployee action seeking to influence the identity of management hierarchy is normally unprotected activity because it lies outside the sphere of legitimate employee interest!" *National Labor Relations Board v. Oakes Machine Corp*., 897 F.2d 84 (2d Cir. 1990)!

While the Second Circuit has held that "[i]n a narrow category of cases" concerted activity to effect the discharge or replacement of a supervisor may be protected if the identity of the supervisor is directly related to terms and condition of employment, the Second Circuit has prescribed the following specific factors in analyzing whether concerted activity to effect the replacement of a supervisor is protected:

> Whether employee activity aimed at replacing a supervisor is directly related to terms and conditions of employment is a factual inquiry, based on the totality of circumstances, including (1) whether the protest originated with employees rather than supervisor; (2) whether the supervisor at issue dealt directly with the employees; (3) whether the identity of the supervisor is directly relate to terms and conditions of employment; and (4) the reasonableness of the means of protest.

The Respondent also maintains that "even if the identity of Ghulam Farooq as supervisor were directly related to the employees terms and conditions of employment, the strike was not protected activity both because the strike was substantially based upon transfer of a non-supervisory employee and because the use of a strike to compel transfer of even a supervisor is unreasonable as a matter of law and unprotected."[68] The Respondent also cites *American Art Clay Co. v. NLRB*, 328 F.2d 82 (7th Cir. 1964), in which the court found that employees concerted activities protesting a change in supervisory personnel, which affects their job interests, is not protected under the Act if the character of the concerted activity is intemperate. The Court found that the walkout was intemperate conduct which destroyed the efficient operation of business. The Respondent additionally cites *Dobbs House, Inc. v. NLRB*, 325 F.2d 531 (5th Cir. 1963), in which the court held that 16 waitresses who walked off the job during the dinner hours believing that the supervisor had been discharged were lawfully discharged because the strike they engage in was an unreasonable way to make known to the employer concern over the supposed discharge.

However, the record evidence supports a finding that the Respondent never made an unconditional offer to the picketing employees. Aside from its requirement of these employees to sign a blank sheet of paper to return to their jobs, the Respondent hired replacements for them and while the Respondent sought to show that the actual purpose of the picketing was to secure the transfer of Supervisor Ghulam Farooq and Oscar Hernandez, Farooq committed many unfair labor practices and

[64] See *Standard Monarch, Inc.*, 237 NLRB 1136 (1978), enfd. 604 F.2d 449 (5th Cir. 1979).

[65] *McWane, Inc. v. NLRB*, 132 LC 11, 637 (6th Cir. 1996) (The court held "in accordance with Board precedent, that an unconditional offer to return to work must be made in such manner and under such circumstances as make it reasonable to infer that [the] offer was communicated to [the employer".]

[66] *Peckeur Lozenge Co*., 98 NLRB 496 (1952), enfd. as modified 209 F.2d 393 (2d Cir. 1053); *NLRB v. Independent Association of Steel Fabricators, Inc.*, 582 F.2d 135 (2d Cir. 1978), cert. denied 99 S.Ct. 1049 (1979).

[67] *NLRB v. Koenig Iron Works, Inc*., 681 F.2d 130 (2d Cir. 1982).

[68] *Abilities and Goodwill, Inc. v. NLRB*, 612 F.2d 6 (1st Cor. 1979) citing *Henning & Cheadle, Inc. v. NLRB*, 522 F.2d 1050 (7th Cir. 1975). *American Art Clay Co., Inc. v. NLRB*, 328 F.2d 82 (7th Cir. 1964).

Hernandez often was shown to be an agent of management. The General Counsel's witnesses testified that they thought to ask for these employees transfer after they were in the second and final week of the picketing, and that it did not change the purpose of the picketing which was to reinstate Chavez, Flores, and Alberto and then all the employees on the picket line. At this point it was clear to the employees that the Respondent would not take them back unconditionally.

In *Koren News*, 297 NLRB 537 (1990), the Board in affirming the administrative law judge stated:

> Thus, although the petition states that the supervisor's "resignation" is the most important point "among the particulars to be improved" the fact is that one of the major points of grievance amongst these employees was their perception that the supervisors behavior was intimidating and overbearing. In *Hoytuck Corp.*, 285 NLRB 904 (1987), the Board stated:
>
> We agree with the judge that employee Cline's conduct in preparing and circulating an employee petition which complained of the conduct of the Respondent's cook and kitchen supervisor, Whitaker, towards employees and further sought his discharge is protected activity here where it is evident that Whitaker's conduct had an impact on employee working conditions. We further note that the finding that an employee protest regarding the selection or termination of a supervisor who has an impact on employee working condition is protected is consistent with long standing Board precedent [case citations omitted]. . . . We wish to make it clear, however, that cases involving employee concerted activity regarding the selection or termination of a supervisor who has an impact on employee working conditions are distinguishable from cases in which employee concerted activity is designed solely to effect or influence changes in management hierarchy. In the latter cases, the Board has found that such conduct does not constitute protected activity.[69]

As in the instant case, the employees were not seeking to influence management hierarchy; they circulated the petition subsequently and towards the end of the strike because the supervisor's (Farooq) and employee (Hernandez) conduct impacted on working conditions.

I therefore find from all of the above that when the Respondent threatened its employees with discharge if they joined, supported or assisted Local 707 or engaged in other protected activities it thereby interfered with restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

I also find from the above that when the Respondent denied its employees Samuel Chavez, Elson Flores, and Jose Alberto the opportunity to work overtime; issued written warnings to Flores and Alberto; reassigned Flores to working on skids a less desirable job; and discharged Chavez, Flores, Alberto, and several other employees and refused to reinstate them, for the reason that they engaged in activities on behalf of Local 707 and/or because they engaged in a work stoppage and other protected and concerted activities or other activities for the purpose or collective bargaining or other mutual aid or protection, the Respondent violated Section 8(a)(1) and (3) of the Act.

Moreover, it appears from the record that the Respondent never made an unconditional offer of reinstatement to the picketing employees. When Angelo Gribbon, the Respondent's office manager approached the employees on the picket line, the return to work by Roozrokh was conditioned on their signing of a blank piece of paper. The employees testified that they were afraid to sign a blank piece of paper.[70]

Chavez, Flores, and Alberto received letters calling them back to work if they signed the blank piece of paper. These employees had first received these letters when they picked up their paychecks, soon after Gribbons approached the employees on behalf of Roozrokh. They did not return to work because they believed that it was unfair to be required to sign a blank piece of paper and because the Respondent had only sent recall letters to Chavez, Flores, and Alberto and not to the other employees on the picket line for whom they were concerned.

I therefore find from the above that the Respondent has failed to rebut the General Counsel's prima facie case and terms and conditions of employment of its employees, thereby discouraging membership in a labor organization in violation of Section 8(a)(1) and (3) of the Act.[71]

I also find the Respondent interfered with, restrained and coerced its employees in the exercise of rights guaranteed by Section 8(a)(1) of the Act.

IV. THE EFFECT OF THE UNFAIR PRACTICES ON COMMERCE

The activities of the Respondent set forth in section III, above, found to constitute unfair labor practices occurring in connection with the operations of the Respondent described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing the free flow thereof.

THE REMEDY

Having found that the Respondent engaged in various unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the purpose of the Act.

Having found that the Respondent unlawfully terminated Samuel Chavez, Elson Flores, Jose Alberto, Julio Rivera. Baltazar Sarabia, Julio C Rivas, Humberto Martinez, Marcos Rivas, Ricardo Martinez, Miguel Coraizaca, Hector Merlos, Esmelin Rivas, Alcides Henriquez, Joel Guzman, Oscar Rivas,

[69] See also *PHT, Inc.*, 297 NLRB 228 (1989), affd. 920 F.2d 71 (D.C. Cir. 1990); *Oakes Machine Corp.*, 288 NLRB 456 (1988).

[70] The Respondent in its brief questioned the validity of the testimony that the Respondent had required picketeers to sign a blank piece of paper before allowing them to return since there was nothing in the record as to why Roozrokh might want such a document. However, this is not as far-fetched as it seems. A signed blank sheet of paper could be used in many ways including a resignation or dismissal. Be that it may, I credit the General Counsel's witnesses that the Respondent made this a requirement for their return.

[71] *Wright Line*, supra.

Carlos Romero, Abelino Martinez, Edgardo Arguesta, Victor Fuentes, Carlos Garcia, Joel Guzman, Elvin Campos, Emilio Pavon, and Mario Romero the Respondent shall be ordered to offer them immediate reinstatement to their former positions, discharging if necessary any replacements hired since their termination, and that they be made whole for any loss of earnings or other benefits by reason of the discrimination against them in accordance with the Board's decision in *F. W., Woolworth Co*., 90 NLRB 289 (1950), with interest computed as in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Also see *Florida Steel Corp*., 231 NLRB 651 (1977), and *Isis Plumbing Co*., 138 NLRB 716 (1962).

Having found that the Respondent issued written warnings to Elson Flores and Jose Alberto, on July 15 and 24, respectively, the Respondent shall be ordered to rescind such warning notices to Flores and Alberto.

Having found that the Respondent unlawfully transferred Elson Flores to working on skids, the Respondent shall be ordered to offer him full reinstatement to his former position as machine operator, discharging if necessary any replacement hired since his transfer, and that he be made whole for any loss of earnings or other benefits by reason of the discrimination against him in accordance with the Board's decision in *F. W. Woolworth Co*., supra, with interest computed as in *New Horizons for the Retarded*, supra.. Also see *Florida Steel Corp*., supra, and *Isis Plumbing Co*., supra.

Because of the nature of the unfair labor practices found herein, and in order to make effective the interdependent guarantees of Section 7 of the Act, I recommend that the Respondent be ordered to refrain from in any like or related manner abridging any of the rights guaranteed employees by Section 7 of the Act. The Respondent should also be required to post the customary notice.

CONCLUSIONS OF LAW

1. The Respondent, American Tissue Corporation, is now and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 707, International Brotherhood of Teamsters, AFL–CIO is now and has been at all times, a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent in violation of Section 8(a)(1) of the Act has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act by threatening employees with discharge if they joined, supported, or assisted Local 707 or engaged in other protected concerted activities; by denying Samuel Chavez, Elson Flores, and Jose Alberto the opportunity to work overtime; by issuing written warning notices to Elson Flores and Jose Alberto; by reassigning its employee Elson Flores to a less desirable job of working on skids; and by terminating Samuel Chavez, Elson Flores, Jose Alberto, Joel Guzman, Abelino Martinez, Carlos Garcia, Ricardo Martinez, Baltazar Sarabia, Esmelin Rivas, Miguel Coraigaca, Edgardo Arguesta, Hector Merlos, Julio Caesar Rivas, Julio C. Rivas, Julio Rivera, Sifredo Martinez, Humberto Martinez, Oscar O. Rivas, Mario Romero, Marcos Rivas, and Alcides Henriguez.

4. The Respondent engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act by terminating the above employees and by other of its actions above because they engaged in concerted activities concerning terms and conditions of employment, or other mutual aid or protection, and in order to discourage employees from engaging in such activities or other concerted activities for the purpose of collective bargaining or other mutual aid or protection and has thereby discriminated and is discriminating in regard to hire or tenure or terms and conditions of employment of its employees.

5. The aforesaid unfair labor practices are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[72]

ORDER

The Respondent, American Tissue Corporation, Suffolk, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with discharge if they joined, supported or assisted Local 707 or engaged in other protected concerted activities.

(b) Denying employees the opportunity to work overtime because they engaged in union activity or protected concerted activities.

(c) Transferring Elson Flores from his position as a machine operator to a lesser position working on skids because of his union activities or protected concerted activities.

(d) Discriminatorily issuing warning notices to employees because of their union or protected concerted activities.

(e) Terminating employees because they engaged in support for Local 707 in a work stoppage, refusal to work overtime, picketing and in protected concerted activities concerning the terms and conditions of employment or other mutual aid or protection and in order to discourage employees from engaging in such activities or other protected concerted activities for the purpose of collective bargaining or other mutual aid or protection.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Samuel Chavez, Elson Flores, Jose Alberto, Joel Guzman, Abelino Martinez, Carlos Garcia, Ricardo Martinez, Baltazar Sarabia, Esmelin Rivas, Miguel Coraizaca, Edwardo Arguesta, Hector Merlos, Julio C. Rivas, Julio Rivera, Sifredo Martinez, Humberto Martinez, Oscar O. Rivas, Mario Romero, Alcides Henriquez, Carlos Romero, Elvin Campos, and Emilio Pavon fill reinstatement to their former positions or, if their jobs no longer exist, to a substantially equivalent position, without prejudice to

[72] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

their seniority or any other rights or privileges previously enjoyed.

(b) Make these employees whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify the employees in writing in both English and Spanish that this has been done and that the discharge will not be used against them in any way.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful disciplinary warnings to Elson Flores and Jose Alberto and within 3 days thereafter, notify them in writing in both English and Spanish, that this has been done and that the warnings will not be used against them in any way.

(e) Preserve and, within 14 days of a request make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at all its facilities in Suffolk, New York, copies of the attached notice marked "Appendix."[73] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent since August 13, 1996.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 29 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. November 12, 1998

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten our employees with discharge if they join, support or assist Local 707 or engage in other protected concerted activities.

WE WILL NOT deny our employees the opportunity to work overtime if they join, support or assist Local 707 or engage in other protected concerted activities.

WE WILL NOT transfer employees from their position to less desirable duties.

WE WILL NOT terminate employees because they joined, supported or assisted the union and /or engaged in protected concerted activities for the purposes of collective bargaining or other mutual aid or protection.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of rights guaranteed to you by Section 7 of the Act.

WE WILL within 14 days from the date of the Board's Order, offer Samuel Chavez, Elson Flores, Jose Alberto, Joel Guzman, Abelino Martinez, Carlos Garcia, Ricardo Martinez, Baltazar Sarabia, Esmelin Rivas, Miguel Coraizaca, Edwardo Arguesta, Hector Merlos, Julio C. Rivas, Julio Rivera, Sifredo Martinez, Humberto Martinez, Oscar O. Rivas, Mario Romero, Alcides Henriquez, Carlos Romero, Elvin Campos, and Emilio Pavon full reinstatement to their former positions or, if their jobs no longer exist, to a substantially equivalent position, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make these employees whole for any loss of earnings and other benefits suffered as a result of the discrimination against them less interim earnings.

WE WILL within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify the employees in writing in both English and Spanish that this has been done and that the discharge will not be used against them in any way.

WE WILL within 14 days from the date of this Order, remove from our files any reference to the unlawful disciplinary warnings to Elson Flores and Jose Alberto and within 3 days thereafter, notify them in writing in both English and Spanish, that this has been done and that the warnings will not be issued against them in any way.

WE WILL within 14 days of the Board's Order restore Elson Flores to his former position as machine operator and if his job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights or privileges previously enjoyed and WE WILL make him whole for any loss of earnings and other benefits resulting from the charges in his job less interim earnings.

AMERICAN TISSUE CORPORATION

[73] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Emily De Sa, Esq., for the General Counsel.
George S. Issacson, Esq. and Daniel C. Stockford, Esq. (Brann & Issacson), for the Respondent.

SUPPLEMENTAL DECISION

JESSE KLEIMAN, Administrative Law Judge. On November 12, 1998, I issued my decision in the above matter (JD(NY)–78–98). The Respondent, American Tissue Corporation, filed exceptions to the decision. On September 13, 1999, the National Labor Relations Board (the Board) granted the Respondent's request to withdraw its exceptions to the decision and adopted the findings, conclusions, and recommendations of the judge. On February 10, 2000, the Board issued a Supplemental Order granting General Counsel's Motion to Correct Inadvertent Errors in this Decision. In the decision I listed 22 discriminatees in my recommended Order as being unlawfully discharged. The Board corrected my recommended Order to reflect instead the names of 26 unlawfully discharged employees.

Subsequent to the Supplemental Order the Board received an opposition from the Respondent contending that only the 22 discriminatees named in the judge's Order should be made whole. The Board treated the opposition as a request for reconsideration of its ruling on General Counsel's motion and, on March 29, 2000, issued a Notice to Show Cause why the Board should not include in its Order the four below-named individuals as discriminatees and why the Respondent should not be required to make them whole as well as the 22 named discriminatees listed in the judge's Order. The Respondent filed a response to the Notice to Show Cause. The Respondent argues that the General Counsel's motion to "correct inadvertent errors" seeks a substantative modification of the judge's decision that is both procedurally improper under the Board's rules and contrary to the evidence. The Respondent further states that its prior withdrawal of its exceptions was premised on its understanding that the judge's decision would not be altered.

As indicated in the Board's Notice to Show Cause, the Board is acting in this matter on the basis of its own authority to modify its decision and order at any time prior to a court's assuming jurisdiction over the case. See *Dorsey Trailers, Inc.*, 322 NLRB 181, 181–182 (1996), and cases cited therein. The Board has an independent responsibility to issue remedial orders that are appropriate to the violations found. Id. The Board in its Order stated that it is "exercising that responsibility here because [its] remedial order, as originally drafted, omitted three persons (Julio Cesar Rivas, Marcos Rivas, and Victor Fuentes) who were either found to have been unlawfully terminated in the judge's conclusions of law section or who, in the section of the judge's decision entitled the remedy, were listed as persons who should be offered reinstatement and backpay." In addition, in the Board's original order "a fourth person, Holman Flores," was omitted, "whom the judge, in the body of his decision at p. 6 fn. 17, treated as part of the same group whom he later found were unlawfully discharged and should be ordered reinstated and made whole for lost pay."[1]

While, for the foregoing reasons, the Board rejected the Respondent's procedural objections insofar as they seek to prevent the Board addressing the inconsistencies between the judge's findings and the Board's order as originally drafted, the Board found that the Respondent's response to its Notice to Show Cause has raised issues concerning the substantive basis of certain of the judge's findings with respect to the four below-named individuals. The Board then concluded that "the issues thus raised are best resolved by remanding this case to the judge for clarification of his decision."

By Order dated June 26, 2000, the Board rescinded its Orders of September 13, 1999, and February 10, 2000, and remanded the proceeding to the administrative law judge to clarify whether Holman Flores, Victor Fuentes, Julio Caesar Rivas, and Marcos Rivas were unlawfully discharged and should be reinstated and made whole. The Board further Ordered that the judge prepare and serve on the parties a supplemental decision setting forth a new recommended order.

In my decision dated November 12, 1998, I found that the Respondent had unlawfully terminated various of its employees in violation of Section 8(a)(1) and (3) of the Act. However, inadvertently in the remedy section of the decision, I named 23 individuals as having been unlawfully discharged by the Respondent, in the conclusions of law section, 21 as unlawfully terminated and in the recommended Order, required the Respondent to make whole 22 individuals.

The record in this case shows that on July 30, 1996, after the other employees learned that Samuel Chavez, Jose Alberto, and Elson Flores were laid off or "terminated," 25 employees, including Chavez, Alberto, and Flores left and went to the Labor Department to file a complaint. These employees were then terminated by the Respondent which resulted in their establishing a picket line at the Respondent's facility.

The evidence clearly indicates that among those terminated were Julio Caesar Rivas, Marcos Rivas, Victor Fuentes, and Holman Flores.[2] Thus in the "Remedy" section of my decision I recommended the immediate reinstatement of the unlawfully discharged employees among whom were Marcos Rivas and Victor Fuentes to be made whole for any loss of earnings or other benefits, but I inadvertently failed to include Julio Ceasar Rivas and Holman Flores. While ommissions were also made in the conclusions of law and recommended Order in the listing of the unlawfully discharged employees especially for rein-

[1] In its Order, the Board remarked that, "[t]he judge's decision contains no explanation why Holman Flores was treated differently from the others." However, there was no reason as reflected in the evidence to justify Holman Flores being treated differently than any of the other discriminatees. Flores accompanied the other employees on July 30 to the New York State Labor Department to file a complaint against the Respondent and was terminated and denied entrance when they returned to work that day. It also should be noted that Julio Caesar Rivas, Marcos Rivas, and Victor Fuentes were among these employees as well.

[2] General Counsel's witnesses testified credibly that Supervisor Ghulam Faroog had told the employees that if they punched out to leave the premises in going to the Labor Department they would be fired. Upon their return to their jobs these employees were denied entrance to the facility. They then established a picket line and commenced picketing. The Respondent had also previously threatened to fire all "Hispanic" employees after a prior "workout" which occurred in early July 1996.

statement and backpay in the Order, it would be an injustice for any of these employees to be denied their rights in view of my determination that the Respondent discriminated against them and violated their rights under the Act.

THE REMEDY

Having found that the Respondent engaged in various unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the purpose of the Act.

Having found that the Respondent unlawfully terminated Jose Alberto, Elvin Campos, Miguel Coraizaca, Victor Fuentes, Joel Guzman, Abelino Martinez, Ricardo Martinez, Hector Merlos, Esmelin Rivas, Edgardo Argueta, Samuel Chavez, Elson Flores, Carlos Garcia, Alcides Henriquez, Humberto Martinez, Sifredo Martinez, Emilio Pavon, Julio C. Rivas, Julio Cesar Rivas, Oscar O. Rivas, Carlos Romero, Baltazar Sarabia, Marcos Rivas, Julio Rivera, Mario Romero, and Holman Flores, the Respondent shall be ordered to offer them immediate reinstatement to their former positions, discharging if necessary any replacements hired since their termination, and that they be made whole for any loss of earnings or other benefits by reason of the discrimination against them in accordance with the Board's decision in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest computed as in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Also see *Florida Steel Corp.*, 231 NLRB 651 (1977), and *Isis Plumbing Co.*, 138 NLRB 716 (1962).

Having found that the Respondent issued written warnings to Elson Flores and Jose Alberto, on July 15 and 24, respectively, the Respondent shall be ordered to rescind such warning notices to Flores and Alberto.

Having found that the Respondent unlawfully transferred Elson Flores to working on skids, the Respondent shall be ordered to offer him full reinstatement to his former position as machine operator, discharging if necessary any replacement hired since his transfer, and that he be made whole for any loss of earnings or other benefits by reason of the discrimination against him in accordance with the Board's decision in *F. W. Woolworth Co.*, supra, with interest computed as in *New Horizons for the Retarded*, supra. Also see *Florida Steel Corp.*, supra, and *Isis Plumbing Co.*, supra.

Because of the nature of the unfair labor practices found herein, and in order to make effective the interdependent guarantees of Section 7 of the Act, I recommend that the Respondent be ordered to refrain from in any like or related manner abridging any of the rights guaranteed employees by Section 7 of the Act. The Respondent should also be required to post the customary notice.

CONCLUSIONS OF LAW

1. The Respondent, American Tissue Corporation, is now and had been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 707, International Brotherhood of Teamsters, AFL–CIO is now and has been at all times, a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent in violation of Section 8(a)(1) of the Act has interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act by threatening employees with discharge if they joined, supported or assisted Local 707 or engaged in other protected concerted activities; by denying Samuel Chevez, Elson Flores, and Jose Alberto the opportunity to work overtime; by issuing written warning notices to Elson Flores and Jose Alberto; by reassigning its employee Elson Flores to a less desirable job of working on skids; and by terminating Jose Alberto, Elvin Campos, Miguel Coraizaca, Victor Fuentes, Joel Guzman, Abelino Martinez, Ricardo Martinez, Hector Merlos, Esmelin Rivas, Edgardo Argueta, Samuel Chavez, Elson Flores, Carlos Garcia, Alcides Henriquez, Humberto Martinez, Sifredo Martinez, Emilio Pavon, Julio C. Rivas, Julio Cesar Rivas, Oscar O. Rivas, Carlos Romero, Baltazar Sarabia, Marcos Rivas, Julio Rivera, Mario Romero, and Holman Flores.

4. The Respondent engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act by terminating the above employees and by other of its actions above because they engaged in concerted activities concerning terms and conditions of employment, or other mutual aid or protection, and in order to discourage employees from engaging in such activities or other concerted activities for the purpose of collective bargaining or other mutual aid or protection and has thereby discriminated and is discriminating in regard to hire or tenure or terms and conditions of employment of its employees.

5. The aforesaid unfair labor practices are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, American Tissue Corporation, Suffolk, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with discharge if they joined, supported or assisted Local 707 or engaged in other protected concerted activities.

(b) Denying employees the opportunity to work overtime because they engaged in union activity or protected activities.

(c) Transferring Elson Flores from his position as a machine operator to a lesser position working on skids because of his union activities or protected concerted activities.

(d) Discriminatorily issuing warning notices to employees because of their union or protected concerted activities.

(e) Terminating employees because they engaged in support for Local 707 in a work stoppage, refusal to work overtime, picketing and in protected concerted activities concerning the terms and conditions of employment or other mutual aid or protection and in order to discourage employees from engaging in such activities or other protected concerted activities for the

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

purpose of collective bargaining or other mutual aid or protection.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Jose Alberto, Elvin Campos, Miguel Coraizaca, Victor Fuentes, Joel Guzman, Abelino Martinez, Ricardo Martinez, Hector Merlos, Esmelin Rivas, Edgardo Argueta, Samuel Chavez, Elson Flores, Carlos Garcia, Alcides Henriquez, Humberto Martinez, Sifredo Martinez, Emilio Pavon, Julio C. Rivas, Julio Cesar Rivas, Oscar O. Rivas, Carlos Romero, Baltazar Sarabia, Marcos Rivas, Julio Rivera, Mario Romero, and Holman Flores full reinstatement to their former positions, or if their jobs no longer exist, to a substantially equivalent position, without prejudice to their seniority or any other rights or privileges enjoyed.

(b) Make these employees whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify the employees in writing in both English and Spanish that this has been done and that the discharges will not be used against them in any way.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful disciplinary warnings to Elson Flores and Jose Alberto and within 3 days thereafter, notify them in writing in both English and Spanish, that this has been done and that the warnings will not be used against them in any way.

(e) Preserve and, within 14 days of a request make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at all its facilities in Suffolk, New York, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent since August 13, 1996.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 29 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. July 17, 2000

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

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To choose not to engage in any of these protected concerted activities.

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WE WILL NOT deny our employees the opportunity to work overtime if they join, support or assist Local 707 or engage in other protected concerted activities.

WE WILL NOT ransfer employees from their position to less desirable duties.

WE WILL NOT terminate employees because they joined, supported or assisted the union and/or engaged in protected concerted activities for the purposes of collective bargaining or other mutual aid or protection.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of rights guaranteed to you by Section 7 of the Act.

WE WILL within 14 days from the date of the Board's Order offer Jose Alberto, Elvin Campos, Miguel Coraizaca, Victor Fuentes, Joel Guzman, Abelino Martinez, Ricardo Martinez, Hector Merlos, Esmelin Rivas, Edgardo Argueta, Samuel Chavez, Elson Flores, Carlos Garcia, Alcides Henriquez, Humberto Martinez, Sifredo Martinez, Emilio Pavon, Julio C. Rivas, Julio Cesar Rivas, Oscar O. Rivas, Carlos Romero, Baltazar Sarabia, Marcos Rivas, Julio Rivera, Mario Romero, and Holman Flores full reinstatement to their former positions or, if their jobs no longer exist, to a substantially equivalent position, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make these employees whole for any loss of earnings and other benefits with interest suffered as a result of the discrimination against them less interim earnings.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharges, and, WE WILL, within 3 days thereafter notify the employees in writing in both English and Spanish that this has been done and that the discharges will not be used against them in any way.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful disciplinary warnings to Elson Flores and Jose Alberto and, WE WILL, within 3 days thereafter, notify them in writing in both English and Spanish, that this has been done and that the warnings will not be used against them in any way.

WE WILL, within 14 days of the Board's Order, restore Elson Flores to his former position as machine operator and if his job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights or privileges previously enjoyed and, WE WILL, make him whole for any loss of earnings and other benefits with interest resulting from the changes in his job less interim earnings.

AMERICAN TISSUE CORPORATION